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In the Supreme Court

of the United States

OCTOBER TERM, 1976

No. 76-423

PUYALLUP TRIBE, INC., and
RAMONA BENNETT,

Petitioners,

v.

DEPARTMENT OF GAME OF THE
STATE OF WASHINGTON, and NORTHWEST
STEELHEADERS COUNCIL OF TROUT
UNLIMITED and GARY ELLIS,

Respondents.

BRIEF OF NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED AND GARY ELLIS

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BRIEF OF NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED AND GARY ELLIS

QUESTIONS PRESENTED

1. Should the decision of the Supreme Court of Washington be reviewed on the three issues that were remanded for such decision by this Court?

2. Should the Puyallup Tribe be allowed to prevent this Court from reviewing the basis of the decision of the Supreme Court of Washington?

3. Can the issue of the reservation fishery be meaningfully reviewed without considering the basis of the decision of the Supreme Court of Washington?

4. Should the Supreme Court of Washington be affirmed in deciding that the state has the duty to manage the entire steelhead resource of the Puyallup River in the interest of conservation?

5. Should the Supreme Court of Washington be affirmed in deciding that the hatchery propagated steelhead on the Puyallup River which are paid for with the license fees and tags of sports fishermen be excluded from the commercial fishery of the Puyallup Tribe?

6. Should the Supreme Court of Washington be affirmed in deciding that the treaty language "in common with all citizens of the territory" reserves to the Puyallup Tribe an equitable share of the natural run of steelhead on the Puyallup River?

COUNTER STATEMENT OF THE CASE

The steelhead is a sea-going rainbow trout which originates in Washington rivers, goes to sea, then returns almost always to the river of its birth to spawn and usually to die (Finding V; R. 109; App. 24). Since 1933, Washington state law has made steelhead a game fish to be caught only with hook and line. RCW 77.08.020. The Department of Game of the State of Washington has "the responsibility for the management and conservation of the steelhead resource in this state," (Finding III; RCW 77.08.020

and 77.12.010). Most of the budget of the Department comes from the earmarked license fees paid by sportsmen (Finding IV; R. 162; App. 32-33). Also since 1933, the Department of Game has operated a hatchery program for the artificial propagation of steelhead trout (R. 147; App. 31-32). The hatchery program for the Puyallup River is "virtually entirely financed" by sports fishermen (Finding X; R. 143, 145, 240; App. 29, 30, 57-58).

Northwest Steelheaders Council of Trout Unlimited (intervenor), the largest sports fishing organization in Washington, is dedicated to the conservation of steelhead trout and other fish. Gary Ellis (intervenor) is the Washington state president of the Northwest Steelheaders and a sports fisherman on the Puyallup River (Complaint in Intervention). There are about 150,000 licensed steelhead fishermen in Washington, of whom 5,171 fish the Puyallup River (Finding XIX, Pl. Ex. 74-17; R. 168; R. 508; App. 63-64).

Puyallup Tribe, Inc. is a corporation composed of the 850 members of the Puyallup Tribe of Indians (R. 755; App. 78). The Puyallup reservation consisting of 18,000 acres at the first seven miles at the mouth of the Puyallup River was sold in 1903 except for 22 acres used as a cemetery (Finding XII in first trial). Members of the Tribe live in Tacoma, and other Washington cities and towns (R. 939; App. 90). Twenty tribal members regularly, 20 more part-time and 20 occasionally fish the Puyallup River commercially

Finding XV; R. 758, 759). These 60 include in the number spouses and children and the official roll shows a total of 20 separate family names (Pl. Ex. 74-29; R. 947; R. 950). Puyallup Tribe members also fish with hook and line, and in accordance with Washington law do not pay the license fee paid by other hook and line fishermen (R. 166, 761; App. 33). Ramona Bennett is the chairperson of the Tribe (R. 754).

In 1855 the United States and the ancestors of the Puyallup Tribe signed the Medicine Creek Treaty which included the following language:

> "The right of taking fish, at all usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the Territory." (10 Stat. 1132)

The prior decisions of this Court established that members of the Puyallup Tribe had the right to to fish commercially for steelhead trout despite the Washington statute which made steelhead trout solely a game fish. These decisions also provided that the state of Washington had the right to regulate the tribal fishery in the interest of conservation. This case was remanded: (1) to decide whether hatchery fish were included within the 1855 Treaty, (2) to determine a method of allocating the steelhead run on the Puyallup River between the Puyallup Tribe and the sports fishermen, (3) and to implement a program of management of the resource in the interest of conservation. *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392 (1968) (hereinafter called *Puyallup I*); *Department of Game* v. *Puyallup Tribe*, 414 U.S. 44 (1973) (hereinafter called *Puyallup II*).

A recent Ninth Circuit decision in which these intervenors were not parties has determined that the Puyallup reservation sold in 1903, and now covered with private land holdings in the city of Tacoma, continues to exist. *U. S.* v. *Washington*, 496 F.2d 620 (9th Cir. 1974); cert. denied 419 U.S. 1032 (1974). Another case in which these intervenors were not parties at trial provides for this allocation of *salmon* on the Puyallup River to the Puyallup Tribe: (a) 50% of all the salmon that reach the Puyallup River ("usual and accustomed grounds and stations") and whose escapement is not necessary to preserve the run, plus (b) all salmon caught for subsistence, plus (c) all salmon caught for ceremonial purposes, plus (d) all salmon caught with hook and line in sports fishing season, plus (e) all salmon caught as part of the regular commercial fishery (in the ocean), plus (f) all salmon caught on the reservation, plus (g) compensatory fish for all salmon originating in Washington waters which are caught in the ocean by American non-treaty commercial fishermen. *U. S.* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (Judge Boldt); aff'd. 520 F.2d 676 (9th Cir. 1975); cert. denied 423 U.S. 1086 (1976).

Most of the commercial fishery is for salmon. The total annual steelhead catch in Washington of 246,000 compares with the salmon catch of 7,777,000 (R. 210; App. 36). Salmon is both a commercial and a game

fish (RCW 75.18.005). The federal courts have given to the Puyallup Tribe most of the salmon fishery of the Puyallup River. The steelhead fishery on the Puyallup River which is at issue here is comparatively small (R. 943, 1061).

In this case, Superior Court Judge Brown held in accordance with the concurring opinion of this Court which was not questioned by the majority opinion that (to quote Mr. Justice White):

> ". . . the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen." (*Puyallup II*, 414 U.S. 44, 49 (1973).

Judge Brown found that the hatchery fish are distinguished by a stubbed dorsal fin (due to crowded conditions in the hatchery) and different growth rings on the fish scales (since hatchery fish usually migrate to the ocean at the end of one year of life instead of two years), (Finding XI; R. 106, 176, 574; App. 23, 34, 65). Though hatchery fish cannot be distinguished until caught, they can be statistically separated by proportion in the total run.

Judge Brown found that the average annual run of steelhead on the Puyallup River consists of 14,715 hatchery fish and 14,715 natural fish by taking the average run during a 10-year period when there was adequate Indian reporting. Allowing a 50% escapement of natural steelhead for conservation purposes, he allocated the Puyallup Tribe 45% of the natural harvestable run, or 3,310 steelhead. He retained continuing jurisdiction of the case. (Findings XII; Pl. Ex. 74-2; R. 148; R. 175; R. 357).

The Puyallup Tribe appealed from the Superior Court decision. The Department of Game and Northwest Steelheaders and Gary Ellis cross-appealed solely from that part of the decision in which the court made a specific allocation of the natural run, rather than setting guidelines for an annual allocation by the Department of Game, subject to court review.

The Supreme Court of Washington *en banc* unanimously affirmed Judge Brown except that it ordered the Department of Game, rather than the Superior Court, to determine the numbers of natural run steelhead to be included in the Puyallup Tribe allocation for future years. *Department of Game* v. *Puyallup Tribe, Inc.*, 86 Wash. 2d 664, 548 P.2d 1058 (1976).

The majority opinion of Justice Hunter stressed:

(1) The Treaty language "in common with all citizens of the territory" in accordance with the opinion of this Court in *Puyallup I*, does not grant to the Puyallup Tribe any specific allocation of steelhead on the Puyallup River but rather guarantees the members of the tribe who were not then citizens equal rights with citizens. This is supported by the language of this Court in *Puyallup I* "that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with'." Otherwise citizens who are Indians would be favored over citizens who are not Indians, in violation of the equal protection clause.

(2) The hatchery steelhead which are paid for with the earmarked license fees and tags of sports fishermen should be excluded from the commercial fishery of the Puyallup Tribe both as a matter of Treaty interpretation and equity. The Treaty did not contemplate Indian rights in artificially propagated fish since none then existed. Furthermore, providing hatchery fish for the commercial nets of the Puyallup Tribe would be a subsidy from the sportsmen who pay for the hatchery program.

(3) Then recognizing that the opinion of this Court in *Puyallup II* unless changed mandates an allocation, the decision of the Superior Court that 45% of the natural run should be awarded to the Puyallup Tribe is affirmed as a matter of equitable discretion.

(4) The state of Washington has the duty of managing the entire steelhead resource of the Puyallup River in the interest of conservation.

The concurring opinion of Chief Justice Stafford stresses that this Court has mandated an allocation of the entire steelhead resource on the Puyallup River and then agrees with points (2), (3), and (4) above.

The concurring opinion of Justice Rosellini agrees with point (1) above, and stresses that the treaty language "in common with" means a fair opportunity to catch fish and not any specific allocation. He notes that management of the steelhead resource in the interest of conservation allows regulation of the manner of fishing, rather than solely assuring an adequate escapement. He also said that it would be a violation of the equal protection of others for Treaty Indian fishermen to have all the benefits of citizenship, plus all the benefits of the special fishery they enjoyed before they became citizens.

Petitioners sought a writ of certiorari and respondents joined in the request asking that the entire judgment be reviewed by this Court.

SUMMARY OF ARGUMENT

The decision of the Supreme Court of Washington should be affirmed because it faithfully complies with the instructions of this Court in remanding *Puyallup II*.

(1) The duty of the State to manage the entire steelhead resource of the Puyallup River is necessary to good conservation. (2) The hatchery propagated fish are excluded from the Treaty fishery of the Puyallup Tribe both as a matter of Treaty interpretation and because they are paid for with the license fees and tags of sports fishermen. (3) The allocation of the natural run of steelhead is made in a fair manner in accordance with the Treaty language and the factors set forth by this Court.

The position of the Puyallup Tribe that they are entitled to all of the steelhead because the steelhead spend a few weeks of their life swimming through the reservation is an incorrect interpretation of the Treaty, bad conservation, and contrary to the instruc-

tions of this Court "to accommodate the rights of Indians under the treaty and the rights of other people" *Puyallup II*, 414 U.S. 44, 49. The reservation fishery is so interrelated to the proper decision of the three issues contained in the remand from this Court that it cannot meaningfully be considered separately.

This is a conservation case. We are dealing with the protection of a fragile, diminishing resource of immense value. The primary concern of Northwest Steelheaders Council of Trout Unlimited and its Washington State President, Gary Ellis, is to maintain that bad fish management cannot be good law.

When we point out that the record in this case shows that the Puyallup Tribe has neglected good conservation principles, we recognize that so might any other commercial user group attempting to exercise the power of government. In asking that the hatchery propagated steelhead equitably belong to the sports fishermen who paid for them with license fees and tags, we are encouraging sports fishermen to participate in this program which enhances the resource. In seeking a fair allocation of the steelhead resource on the Puyallup River, we are recognizing that the rights of all fishermen need protecting. We reject federalization of the fishery because we see what is now happening on other Washington rivers with a federal judge as perpetual fishmaster. We know that the steelhead resource of the Puyallup River can best be conserved and the rights of all citizens protected by expert, independent, unified management by the state of Washington.

ARGUMENT

I. The Decision of the Supreme Court of Washington Should Be Reviewed on the Three Issues That Were Remanded for Such Decision by This Court

This Court in *Puyallup II* remanded this case to the courts of Washington to resolve three issues:

(1) to decide whether hatchery steelhead were included within the 1855 Treaty;

(2) to determine a method of allocating the steelhead run on the Puyallup River between the Puyallup Tribe and the sports fishermen; and

(3) to implement a program of management of the resource in the interest of conservation.

Pursuant to the remand, the Pierce County Superior Court, Honorable William L. Brown, Jr. presiding, conducted a ten day trial in May and June, 1974, resulting in a 1,199 page transcript of evidence with 44 exhibits. Puyallup Tribe, Inc. and its Chairperson, Ramona Bennett, were represented by a private attornye from Washington, D. C., a private attorney from Seattle, Washington, an Assistant United States attorney from Seattle, Washington, and an Assistant Regional Solicitor of the U. S. Department of the Interior from Portland, Oregon. The United States Fish and Wildlife Service provided its manager of the Northwest Fisheries Program as expert witness for the Puyallup Tribe.

The decision of the Superior Court which was essentially affirmed by the unanimous Supreme Court

of Washington (with three detailed opinions) spoke to the three issues contained in the remand. On each issue, the Washington Court disagreed with the decision of the Ninth Circuit in *U. S.* v. *Washington*, 520 F.2d 676 (9th Cir. 1975), which deals with salmon on the Puyallup River and both steelhead and salmon on other Western Washington rivers. The disagreements can best be understood by the table that appears on the opposite page.

This conflict between the highest court of the state and the highest court of the circuit is presumably a reason why this Court granted certiorari. Though the decision in this case will not directly affect more than the steelhead run on the Puyallup River, its impact can resolve one of the most difficult controversies ever to divide the citizens of Washington.

II. The Puyallup Tribe Should Not Be Allowed to Prevent This Court from Reviewing the Basis of the Decision of the Supreme Court of Washington

A. The Puyallup Tribe and the United States which has participated in the representation of the Puyallup Tribe have proceeded inequitably in trying to restrict the issues in this case.

After the decision of the Washington Supreme Court, the Puyallup Tribe stated in August, 1976 to Northwest Steelheaders that it would seek certiorari against both the exclusion of the hatchery steelhead from the Treaty commercial fishery and against State regulation of the entire steelhead run on the Puyallup

Questions Presented	This Court in Puyallup I	This Court in Puyallup II	9th Circuit in U. S. v. Washington	Washington Supreme Court in This Case Puyallup III	Actual Effect of Conflict upon Management of the Anadromous Fish Resource in the Western District of Washington
1. Right of the State to Manage the Resource.	"And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power . . . But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians . . . The overriding police power of the State, expressed in non discriminatory measures for conserving fish resources, is preserved." 391 U.S. 392 at 398, 399 (1968)	- - - - - - - - - -	"Therefore, the district court wisely insisted that proposed state regulations be submitted to it for approval before being enforced as to treaty Indians." 520 F.2d 676 at 687 (1975)	The state of Washington is to manage the entire steelhead resource of the Puyallup River in the interest of conservation.	On the Puyallup River at the present time the: 1. Yakima Tribe may self-regulate its own fishery; 2. Muckleshoot Tribe fishery is regulated by Judge Boldt; 3. steelhead fishery of the Puyallup Tribe is regulated by the Washington Superior Court though Judge Boldt has enjoined the Department of Game (but not the Superior Court) from excluding hatchery fish; 4. salmon fishery of the Puyallup Tribe is regulated by Judge Boldt; 5. salmon fishery of non-treaty fishermen is regulated by the State after its regulations are approved in advance by Judge Boldt; 6. steelhead fishery of non-treaty fishermen is regulated by the State (according to the Washington Supreme Court) or by Judge Boldt (according to Judge Boldt).
2. Exclusion of Hatchery Fish from the Treaty Fishery.	- - - - - - - - - -	"We know from the record and oral argument that the present run of steelhead trout is made possible by the planting of young steelhead trout called smolt and that the planting program is financed in large part by the license fees paid by the sports fishermen." Majority op., 414 U.S. 44 at 47 (1973) . . . the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen." Concurring op., 414 U.S. at 49	- - - - - - - - - -	"We hold therefore that the Puyallup Indians have no rights in the hatchery run of steelhead other than those enjoyed by all citizens of the state." 548 P.2d 1058 at 1072 (1976)	On the Puyallup River the Superior Court is excluding the hatchery steelhead from the treaty fishery while the state of Washington (but not the Superior Court) is under federal injunction to include the hatchery fish in the treaty fishery. But under the limited definition of conservation adopted by the federal court, the Nisqually and Puyallup tribes can place nets across the entrance and block the Washington State South Tacoma Hatchery on Chambers Creek which is the source of the hatchery steelhead for the Puyallup River.
3. The Allocation of Fish to Treaty Fishermen.	- - - - - - - - - -	"Only an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species. If hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned. What formula should be employed is not for us to propose. There are many variables — the number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like." 38 L. Ed.2d 254 at 258 (1973)	(a) 50% of all the salmon that reach the Puyallup River ("usual and accustomed grounds and stations") and whose escapement is not necessary to preserve the run, plus (b) all salmon caught for subsistence, plus (c) all salmon caught for ceremonial purposes, plus (d) all salmon caught with hook and line in sports fishing season, plus (e) all salmon caught as part of the regular commercial fishery (in the ocean), plus (f) all salmon caught on the reservation, plus (g) compensatory fish for all salmon originating in Washington waters which are caught in the ocean by American non-treaty commercial fishermen.	". . . the Indians share equally, i.e., in common with other citizens, the public right to fish and, in addition, are guaranteed access to certain fishing locations." Majority opinion, 548 P.2d 1058 at 1068 "Moreover, we feel constrained by the express language on the face of Puyallup II, when considered independent of Puyallup I, to defer to the statement in Puyallup II, recognizing an Indian right to a net fishery. Therefore, pending an ultimate disposition of this issue by the United States Supreme Court, we will follow Puyallup II and undertake a consideration of the allocation question expressly called for by that case." Majority opinion, 548 P.2d 1058 at 1070	Since the reservation is the first seven miles of the river, and since the federal court does not limit the manner of fishing, this means according to the Ninth Circuit that the Puyallup Tribe could put a fish trap across the river within their reservation and take *all* the fish. The concurring opinion of Justice Rosellini points out that under Judge Boldt as perpetual fishmaster, the following occurred in December, 1975: ". . . the Indians caught 2,476 fish on the Puyallup River, while 1,341 sportsmen fishing by line and hook caught only 102. In Western Washington Green River, 12,000 non-Indians caught only 50 fish, while Indian netters took 4,839. On the Skagit River, 893 sportsmen caught 89 fish while the Indians netted 2,367 fish." 548 P.2d 1058 at 1079.

River because the river runs through the reservation (Att. A).

Thereafter the Puyallup Tribe and the United States sought and obtained from the United States District Court for the Western District of Washington at Tacoma an order on August 13, 1976 enjoining the state of Washington from excluding the hatchery steelhead on the Puyallup River from the treaty commercial fishery (Att. B). The federal court (Judge Boldt) announced that it would retry the same issue between most of the same parties that had been tried for ten days before the Washington Superior Court and affirmed by the Washington Supreme Court in this Case! *Res judicata* is apparently not controlling in the United States District Court for the Western District of Washington. Northwest Steelheaders and Gary Ellis are parties in this case but were denied intervenor status in the federal court case.

When the Puyallup Tribe filed its petition for certiorari in this case on September 23, 1976, they disregarded their representation to Northwest Steelheaders and did not seek review of the exclusion of the hatchery steelhead from the treaty fishery.[1]

Commercial fishermen who were also denied intervenor status by the federal court brought suit in the Washington Supreme Court to assert their rights in

[1] The Puyallup Tribe says in a footnote to its brief that we are too late to raise the issue of exclusion of the hatchery steelhead (Pet. Br. 2). This is not correct for the reasons that will be discussed in the next section. But, if it were correct, our reliance on their representation equitably estops them from making such an argument.

the Washington salmon run. In argument in that case, before the Washington Supreme Court on November 9, 1976 Edmund B. Clark, Chief of Appellate Section, Land and Natural Resources Division of the Department of Justice, appearing on behalf of the United States, *amicus curiae*, argued that the state court should not take jurisdiction because he probably would urge this Court to resolve the basic issues in this case (Att. C). It is our understanding that the Department of Justice in its *amicus curiae* brief to this Court in this case will join the Puyallup Tribe in suggesting that the issues be restricted to regulation of the reservation fishery rather than as suggested by the United States to the Supreme Court of Washington.

This inequitable conduct should not be allowed to succeed.

B. The three basic issues of the remand are fairly comprised within the reservation fishery issue raised in the Petition for Certiorari.

The Puyallup Tribe describes the issue as

> "Whether, consistently with established principles of tribal immunity, a state court may adjudicate on-reservation treaty fishing rights of an Indian tribe and allocate the catch among tribal and non-tribal fishermen." (Pet. Br. 2)

The Puyallup Tribe argues that "usually review here is confined to the questions raised in the petition.

See e.g., *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 428 (1964); *Irvine* v. *California*, 347 U.S. 128, 129 (1954); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 177 (1938)"; (Pet. Br. 38). But all three of these cases were situations in which the petitioners sought to raise additional grounds to reverse the judgment below that were not covered in the original request for certiorari. They have nothing whatsoever to do with our case in which we seek to defend the judgment below upon the very grounds used by the lower court.

In this case, as will be argued in greater detail later, the reservation was sold in 1903 and is now a legal fiction. But even assuming a reservation, the decision of the Supreme Court of Washington to consider the impact of the reservation fishery cannot be meaningfully reviewed without considering the three basic issues.

1. This Court instructed the Washington courts to develop a program of regulating the commercial fishery of the Puyallup Tribe in the interest of conservation. "The aim is to accommodate the rights of Indians under the Treaty and the rights of other people" (*Puyallup II*, 414 U.S. 44, 49).

In the absence of regulation, the Puyallup Tribe could place a fish trap at the mouth of the river, which is in the reservation, and catch every steelhead. In Puyallup II, this Court said:

> "The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets." (414 U.S. 44, 49)

The issue of whether the state should manage the entire steelhead resource of the Puyallup River in the interest of conservation is the other side of the Puyallup Tribe's argument that the state should only manage the portion of the steelhead resource that escapes up stream past the tribal gill nets.

2. Three members of this Court in the concurring opinion in *Puyallup II* said that:

> ". . . the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen." 414 U.S. 44, 49.

If the hatchery planted fish are excluded from the Treaty fishery, then the hatchery fish must be allowed to pass through the reservation as does the water in which they swim. This is the other side of the Puyallup Tribe's argument that they can catch all of the hatchery steelhead because they spend a few weeks of their life cycle swimming through the reservation.

3. This Court in *Puyallup II* instructed the Washington Courts that the steelhead in the Puyallup River "must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing," and

then listed some variables to be considered. 414 U.S. 44, 48, 49.

The Washington Courts in making the apportionment first considered the impact of the Treaty language "in common with all citizens of the territory" and then affirmed the trial court's finding of an equitable apportionment of the natural run. This is the other side of the Puyallup Tribe's argument that the fair apportionment should be all for the tribe and none for the sports fishermen because the steelhead swim through the reservation.

The Puyallup Tribe apparently wants this Court to hear only their side of the argument.[2]

C. This Court can and should consider the three basic issues of the remand even if they are not fairly comprised within the issue raised in the Petition for Certiorari.

Respondents Department of Game of the State of Washington, Northwest Steelheaders Council of Trout Unlimited and Gary Ellis were entirely successful in the Court below on the three issues contained in the remand from this Court and had no right to have the decree on those points reviewed in this Court if petitioners had not sought certiorari. *New York Telephone Co.* v. *Maltbie*, 291 U.S. 545 (1936); *Lindheimer* v. *Illinois Telephone Company*, 292 U.S. 151 (1936).

[2] Even if the Puyallup Tribe is correct, the three basic issues need to be reviewed by this Court to determine the management of the off-reservation fishery.

On the other hand, if there had been adverse findings of fact necessary to the decree or where the lower court granted one claim and denied another, then a party may seek review from the adverse findings or portion of the decree. *Postmar Corp.* v. *Paramount Corp.*, 347 U.S. 89 (1954); *Electric Fittings Corp.* v. *Thomas Betts Co.*, 307 U.S. 241 (1939). This would have to be done by cross appeal or counter petition. *Helvering* v. *Pfeiffer*, 302 U.S. 247 (1937), and would have to be filed within the original 90-day period from the final judgment. 28 U.S.C. § 2101(c). There were no such adverse findings or portions of the decree of the lower court in our case.

In this case, in an abundance of caution, respondents called their briefs which joined in the request for certiorari, "counter petitions." This Court required respondents to rename their briefs "responses", but the same issues remain.

Indeed, respondents can now raise other points in support of the judgment of the Court below that *were not even discussed* by the Court below so long as respondents' rights under the judgment are not enlarged. *United States* v. *American Railway Express Co.*, 265 U.S. 425 (1924); *Langles* v. *Green*, 282 U.S. 53 (1931); *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555 (1931); *Stelos* v. *Hosiery Motor Mend Co.*, 295 U.S. 237 (1935); *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

This Court has on occasion heard and decided issues not presented by either side, such as in *Boynton*

v. *Virginia*, 364 U.S. 454 (1960); *Anderson* v. *United States*, 417 U.S. 211 (1974); *Redup* v. *New York*, 386 U.S. 76 (1967); *NLRB* v. *Lyon Oil Co.*, 352 U.S. 282 (1957).

If respondents can raise new issues to sustain the judgment below or the Court can consider new issues, surely respondents can defend the Supreme Court of Washington on the basic issues which that Court *did decide* in accordance with the remand of this Court.

The Puyallup Tribe now says in its brief that the three issues of the remand cannot be reviewed because they were contained in the briefs erroneously designated "counter-petition" (Pet. Br. 2, 38). This is incorrect for several reasons: (1) these issues are fairly comprised within the issues contained in the petition since they are basic to the decision of the Court below on the reservation question, (2) these issues are properly discussed in the response filed by Northwest Steelheaders Council of Trout Unlimited and Gary Ellis, (3) these issues will sustain the judgment below, and (4) these issues are of such overwhelming importance to the citizens of Washington that they need to be resolved. See letter from members of Washington State Congressional Delegation to the U. S. Department of Justice (Att. D).

The majority opinion of the Washington Supreme Court in this case holds a major portion of its ruling in abeyance, pending review by this Court.

In an even more recent decision, the Washington court almost pleads with this Court to review the

basis of its decision in this case. In *Washington State Commercial Passenger Fishing Vessel Association* v. *Tollefson*, 87 Wash. 2d 417, 553 P.2d 113 (August, 1976), the court says:

> "Another question not considered in the briefs arises from the fact that this court has itself interpreted one of the treaties in question and has arrived at a conclusion as to its meaning which differs from that of the federal court. *Department of Game* v. *Puyallup Tribe, Inc.*, 86 Wn2d 664, 548 P2d 1058 (1976). To which of these interpretations must the state agency respond? The resolution of this question cannot come from this court or from the federal district court, if no definitive authority upon the subject exists. It must come from a higher court whose decisions are binding upon both of us. In short, this dilemma can be resolved only by the Supreme Court of the United States, which, we understand, has been asked to take jurisdiction of the cases involved and settle the question." (87 Wn. 2d 417, 421)

This Court should deal with the fundamental issues and settle the question.

III. The Supreme Court of Washington Should Be Affirmed in Deciding That the State Should Manage the Entire Steelhead Resource of the Puyallup River in the Interest of Conservation

The basic reason why the Supreme Court of Washington decided that the State should manage the entire steelhead resource of the Puyallup River is because this Court told it to do so. In both prior decisions in this case this Court stressed that the fishing of the Puyallup Tribe "may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians". *Puyallup I*, 391 U.S. 392, 398 and, *Puyallup II*, 414 U.S. 44, 48.

The United States Constitution provides in the Tenth Amendment that:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The state of Washington entered the Union in 1889 with every right of the thirteen original states.

Puyallup I as later approved by *Puyallup II*, states:

> "The overriding police power of the State expressed in non-discriminatory measures for conserving fish resources, is preserved." (391 U.S. 392, 398-399 (1968)

Similar decisions were made by this Court in 1876, 1891, 1896, 1905, 1916, 1924, 1942, and 1962. *McCready* v. *Virginia*, 94 U.S. (4 Otto) 391 (1876); *Manchester* v. *Massachusetts*, 139 U.S. 240 (1891); *Ward* v. *Race Horse*, 163 U.S. 504 (1896); *U. S.* v. *Winans*, 198 U.S. 371 (1905); *Kennedy* v. *Becker*, 241 U.S. 556 (1916); *Lacoste* v. *Dept. of Conservation*, 263 U.S. 545 (1924); *Tulee* v. *Washington*, 315 U.S. 681 (1942); *Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962).

The objective mandated by this Court is conservation of the steelhead resource.

Judge Cochran in the first trial in this case (Finding XV) and Judge Brown in the recent trial in this case (Conclusion IX) have held that state regulation of Puyallup Tribe fishing is necessary for conservation.

Here are some of the facts in this record which support the finding:

(A) Ramona Bennett the chairperson of the Tribe testified:

(1) The Tribe has no enforcement officers (R. 78).

(2) The Tribe has no direct reporting of the Indian catch; the only reporting is from the commercial fish buyers (R. 784, 811; App. 81).

(3) The Tribe does not know what the average catch is (R. 798; App. 85-86).

(4) The Tribe does not know how many fish escape to spawn (R. 282; App. 87).

(5) The only evidence of overfishing used by the Tribe is poor catches as reported by its fishermen (R. 767; App. 79).

(6) 1971 tribal fishing regulations were still in effect at the time of trial (May and June 1974) (R. 777; App. 80).

(7) The tribe has waived its regulations when requested by its fishermen (R. 781; App. 80-81).

(8) Every requested Indian fishery has been recognized and approved by the Tribe (R. 782; App. 81).

(9) The Indian fishermen themselves report violations (R. 781; App. 80-81).

10) The Tribe wants to increase its steelhead catch 1,000 each year though they have no studies of future run sizes (R. 788-790; App. 82-83).

(11) The Tribe did continue fishing past the January 17, 1974 closing date set by the Department of Game for fishing by this Tribe (R. 787; App. 82).

(B) Hank Adams, the fisheries management coordinator of the Tribe testified:

(1) He has no courses in fishing management (R. 926; App. 88).

(2) His future plans do not specifically include direct reporting of fish catches by Tribal fishermen (R. 903).

(3) He says the Tribal fishermen "would not necessarily" disregard the escapement and sports catch in determining the amount of their harvest (R. 920; App. 88).

(4) He says that the 1971 Tribal regulations require an official list of fishermen with a registration card, but he has not made up that list because new regulations will be made up (R. 924).

(5) The list of Tribal fishermen furnished by the witness Adams included some names typed in April or May, 1974, and some added in ink during the noon hour recess in his testimony at trial (Pl. Ex. 74-29; R. 947; R. 950; R. 934; App. 89).

(C) James Heckman of the U. S. Fish and Wildlife Service testified:

(1) In 1971 the State Department of Fisheries and his federal agency both recommended that the Tribe reduce the chinook salmon season by two days each week in the interest of conservation and the Tribe only reduced it by one day (R. 1030, 1031; App. 91-92).

(2) In 1973, the State Department of Fisheries recommended a reduction in chinook salmon fishing in the interest of conservation and the Tribe refused (R. 1034; App. 92).

The pattern that emerges is that the commercial tribal fishermen really do what they want to do without any independent control by the Tribe. But self regulation by any commercial group is not adequate to protect a fragile resource.

The Puyallup Tribe is apparently so concerned about the strength of this record on the issue of the need for conservation management by the State that their counsel testifies himself at length beyond the record in their brief in this Court (Pet. Br. 12). Rather than yielding to similar temptation, we need only point out that in December 1976 Judge Brown who tried this case, found it necessary to issue a Temporary Restraining Order and then a Preliminary Injunction against the Puyallup Tribe to stop them from continuing to fish beyond their allocation because they were doing "immediate and irreparable injury to the steelhead resource."

Even if the Puyallup Tribe had adequate regulation in the interest of conservation (which they do not on this record) the threat of multiple management of the same resource remains. This is eloquently discussed by this Court in the treaty fishing case, *Kennedy* v. *Becker*, 241 U.S. 556 (1916), where the Court rejected dual control of the resource by a Tribe and the state, saying:

> "Such a duality of sovereignty, instead of maintaining in each the essential power of preservation, would in fact deny it to both." 241 U.S. 556, 563.

There must be one independent state agency, the Department of Game, with the authority to regulate all steelhead fishing on the Puyallup River.

Fisheries management is a very important science at the University of Washington and 106 schools throughout the country. ROYCE, INTRODUCTION

TO THE FISHERY SCIENCES, Preface I, X (1972). Regulatory decisions must be made by experts exercising great care. A mistaken prediction of escapement needs may show no effect at the time, but result in extinguishing an entire run after two or three life cycles have been completed. CRUTCHFIELD AND PONTECORVO, THE PACIFIC SALMON FISHERIES, A Study of Irrational Conservation, 167. For example, starting in 1880 in Southern California mistaken estimates of escapement needs and overfishing by commercial fishermen virtually eliminated salmon in that area of the state. NETBOY, THE SALMON, THEIR FIGHT FOR SURVIVAL (1974). Run size can change dramatically from year to year as can the amount of water in the river. Conservation requires that certain methods of harvesting fish be avoided regardless of the numbers.

Though predictions can be made ahead of time, a run cannot be accurately estimated until it is about to enter a river and then management decisions have to be made quickly. The Department of Game has 23 staff members with degrees and training in fish biology who can provide the required expertness. (R. 223-224; App. 39)

James Heckman, the expert witness for the Puyallup Tribe in this case also stressed that conservation includes maintenance of the habitat of the specie, which requires adequate water supply, egg incubation areas, food and shelter (R. 677, 678).

The concurring opinion in the Washington Su-

preme Court defines conservation in the same way it was defined by that court in its decision in *Puyallup II:*

> "Conservation means the wise use of the resource, and in the management of steelhead there must be necessary escapement for needed spawning to ensure the perpetuation of the resource. The manner of fishing must be such that it can be controlled so it does not impair or damage the necessary escapement; and further, the manner of fishing itself must not be destructive. 548 P.2d 1058, at 1079 (Cert. Pet. App. B-64) *Cf. Department of Game* v. *Puyallup Tribe*, 80 Wash. 2d 561, 497 P2d 171 (1972).

Federal Judge Boldt on the other hand, limits the definition of conservation to adequate escapement. He has ruled that eleven Washington conservation statutes which apply to all other citizens of the state cannot be enforced against the Puyallup Tribe or any other Treaty fishermen. *U. S.* v. *Washington*, 384 F. Supp. 312, 415. This means that the following conservation needs are now beyond the regulatory power of the State of Washington for rivers other than the Puyallup:

1. Regulating mesh size in salmon fishing which can prevent an incidental catch of the steelhead which are smaller.

2. Regulating the timing of a fishing season which can prevent the depletion of already threatened wild native stock, since they may enter a river at slightly different times than hatchery fish.

3. Preventing underfishing which can damage a run by increasing the competition among the fish for spawning areas.

4. Preventing certain techniques of harvesting fish, such as dynamite charges which cause waste, and the fish wheel, which has the potential of totally eliminating a run on a particular river.

5. Requiring the removal of nets from the water periodically, so that fish will not be wasted.

6. Varying fishing opportunities in different years, since on some runs all fish should escape for spawning, while on other rivers the run is so large that 85% or more can be safely harvested.

7. Preventing all fishing at the mouth of hatcheries when this would deplete the returning run necessary for the continuation of the hatchery program.

VAN CLEVE and JOHNSON, MANAGEMENT OF THE HIGH SEAS FISHERIES OF THE NORTHWESTERN PACIFIC, 17 (1963); ROBINSON AND ROLLINS, MANAGING AQUATIC RESOURCES, OUR CHANGING FISHERIES 136 (1971).

An affirmance in this case would allow the Washington Department of Game and state courts to continue the enforcement of these eleven statutes on the Puyallup River, and might have some influence on Judge Boldt for the other western Washington rivers.

The Puyallup Tribe argues in its brief that the State cannot preserve the steelhead resource because

the Puyallup River flows through the reservation of the Puyallup Tribe.

In the original trial of this case, Judge Cochran found in Finding XII that the Puyallup Indian reservation of 18,000 acres was sold in 1903 pursuant to an Act of Congress with the exception of 22 acres being used as a cemetery. His finding was discussed but not changed by this Court in footnote 1, *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392, 394. The finding was set forth by Judge Brown in his Finding I in this case.

After the remand, but before the decision by Judge Brown, the Ninth Circuit decided in *U. S.* v. *Washington*, 496 F.2d 620 (1974), a case in which we were not parties, "that the Puyallup Indian Reservation continues to exist," without further definition of what was intended. This Court denied certiorari, 419 U.S. 1032 (1974).

The implications of this decision stagger the imagination. Much of the "reservation" is now the City of Tacoma, Washington. Sports fishermen continue to fish for steelhead from the banks or in small boats within the "reservation" (R. 811). The State owns the bed and shores of the Puyallup River up to ordinary high water. Article XVII, Constitution of Washington. If the reservation "still exists," must the Puyallup Tribe repurchase the land at present market value from those to whom it was sold in 1903 and who have long thought that they had quiet title? Alternatively, can tribal members trespass on what the purchasers

assumed to be their own property? Must Puyallup Tribe members obey traffic signals in the City of Tacoma since the Ninth Circuit says the reservation "continues to exist"?

There is on file with this Court the *amicus curiae* brief of the National Tribal Chairmen urging the integrity of reservation land. A major problem with their argument is that in this case there is no reservation land. Nor are we dealing with a lake enclosed within a reservation or a fishing stream with a resident population of fish.

Natural steelhead spawn upstream on the Puyallup River. In addition, the Department of Game places hatchery steelhead smolt (one year old steelhead) upstream on the Puyallup River. Natural steelhead migrate to the ocean after two years of life; hatchery steelhead after one year. The migration takes about a week, so they are within the Ninth Circuit's "reservation" for less than a week. They then live in the ocean for several years before making their journey back to Commencement Bay and the Puyallup River. (R. 104, 108, 142; App. 23, 24). Though no one knows exactly how long it takes a steelhead to swim upstream on the Puyallup River, a steelhead actively migrating could swim seven miles in a day or two. FALTER and RINGE, THE POLLUTION EFFECTS ON ADULT STEELHEAD MIGRATION IN THE SNAKE RIVER, Environmental Protection Agency - 660/3 - 73-017 (Feb. 1974). Does this couple of weeks swimming through the reservation as part of their four or five year life cycle outside of the reser-

vation mean that all these anadromous fish are the exclusive property of the Puyallup Tribe?

The Puyallup Tribe brief justifies this unusual result by citing cases giving tribes exclusive control over reservation activities such as adoptions. See for example, *Fisher* v. *District Court*, 424 U.S. 382 (1976) (Pet. Br. p. 21).

The concurring opinion below of Chief Justice Stafford after discussing similar cases, distinguishes them in this way:

> "On the other hand, it is only logical to assume the Supreme Court is equally aware of the above cited cases and had them in mind when the following broad language was used in *Puyallup II* at page 49:
>
> > The aim is to accommodate the rights of Indians under the Treaty and the right of other people.
> >
> > We do not imply that these fishing rights persist down to the very last steelhead in the river. *Rights can be controlled by the need to conserve a species;* and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. *The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.* (Italics mine.)
>
> "When one considers the fragile nature of the fishery involved, as well as the State's physical and financial support of that resource, it is easy to understand the above quoted language. If the Supreme Court has not recognized the existence of a State power to control and supervise the mandated allocation, the Supreme Court's direction would, for all practical purposes, be impossible to establish, implement, and enforce. Without question the Supreme Court did not intend to direct the State of Washington to perform a useless act." *(Department of Game* v. *Puyallup Tribe, Inc.*, 548 P.2d 1058, 1075 (Cert. Pet. App. B. 47-48).

The concurring opinion of Justice Rosellini also adds that if they was any intention in the treaty with the Puyallups of giving them exclusive control over the reservation fishery this could have been stated. He points out that:

> "A treaty signed in June 1855 in Walla-Walla Valley between the United States and the Walla-Walla Tribe, 12 Stat. 945, 946, illustrates that the Indians and United States were capable of using explicit language when it was desired to give exclusive rights to Indians to fish. Article 1 of the treaty says
>
> > [t]hat *the exclusive right of taking fish in the streams running through and bordering said reservation* is hereby secured to said Indians, and at all other usual and accustomed stations in common with citizens of the United States, and of erecting suitable buildings for curing the same; the privilege of hunting, gathering roots and berries and pas-

turing their stock on unclaimed lands in common with citizens, is also secured to them. [emphasis added]

"It can be seen that in the Walla-Walla Treaty, the Indians reserved the exclusive right to take fish from streams running through and bordering said reservation and outside their reservation in common with the citizens of the United States. There was no difficulty in selecting the words to convey the separate ideas of 'exclusive rights' and 'rights secured in common' with the citizens of the United States." (548 P.2d 1058, 1076-77) (Cert. Pet. App. B. 54-55).

In *Antoine* v. *Washington*, 420 U.S. 194, 95 S. Ct. 944, 43 L. Ed. 2d 129 (1975), reservation land of the Colville Tribe had been ceded to the United States with an agreement that retained Indian hunting rights. This Court reversed the convictions of two Colville Indians who hunted on that land in violation of state law. Both the majority and the concurring opinions cited the *Puyallup* cases as allowing state regulation in the interest of conservation. But then Justice Douglas points out in the concurring opinion that:

"In any event no conservation interest has been tendered here. The record in this case is devoid of any finding as to conservation needs or conservation methods." (95 S. Ct. 944, 954).

Our case similarly deals with reservation land that has been sold, and the Ninth Circuit has ambiguously held that the reservation "continues to exist." But in our case, unlike *Antoine*, the record has been made of

the conservation necessity for state management of the resource.

In *U. S.* v. *Washington*, 384 F. Supp. 312 (W.D. Wash., 1974) Judge Boldt first said that the reservation fishery could not be regulated. On October 21, 1975, after the Ninth Circuit affirmance, but as part of his continuing jurisdiction, he issued Finding of Fact 285 and Conclusion of Law 68 as follows.

"No. 285. The on-reservation fisheries of the Puyallup and Nisqually Tribes for pink and chinook salmon involve runs which are subject to the decrees of this court in this case because they are the subject of treaty provisions securing to these and other Indian tribes the right of taking fish at off-reservation locations in common with others. Thus, on-reservation and off-reservation fisheries on these runs are interrelated and the preservation of such runs can be affected by the extent of both on and off reservation fishing on them."

"No. 68. This Court has jurisdiction over the Puyallup and Nisqually Tribes and jurisdiction in this case to order them to curtail or terminate their fisheries within the exterior boundaries of their reservations on runs of fish affected by this Court's decrees when necessary for the effectuation of the decrees or the preservation of such runs."

The Puyallup and Nisqually Tribes have appealed this salmon ruling of Judge Boldt's to the Ninth Circuit. So even Judge Boldt now finally recognizes the interrelation of the on-reservation and off-reservation fishery.

It needs to be remembered that this Court in the earlier decisions in this case said that the entire steelhead resource on the Puyallup River should be managed in the interest of conservation by the State of Washington.

IV. The Supreme Court of Washington Should Be Affirmed in Deciding That the Hatchery Propagated Steelhead on the Puyallup River which Are Paid for with the License Fees and Tags of Sports Fishermen Should Be Excluded from the Commercial Fishery of the Puyallup Tribe

Mr. Justice White in the concurring opinion in *Puyallup II* has stated:

> "On the other hand, the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen." (414 U.S. 44, 49).

Mr. Justice Douglas writing for the majority, does not disagree with the concurring opinion. He says:

> "We know from the record and oral arguments that the present run of steelhead trout is made possible by the planting of young steelhead trout called smolt and that the planting program is financed in large part by the license fees paid by the sports fishermen." (414 U.S. 44, 47).

The case was remanded to develop a fuller record with the clear implication that hatchery fish are outside of the Treaty. Mr. Justice Douglas quoted counsel for the Department of Game ". . . that approximately 80% of the cost of that program was financed by

sports fishermen." 414 U.S. 44, 48. Actually the record as now developed on remand shows that all of the steelhead trout planted in the Puyallup River come from the Washington State South Tacoma hatchery on Chambers Creek which is financed 100% from state funds derived from users (R. 140, 162; App. 27, 33).

In 1933 the State of Washington established the Game Fund to be financed by user fees. RCW 77.12.-170. This earmarking of user funds to develop a recreational resource which specially benefitted the users, but also provided incidental benefit to all citizens of the state, became the pattern around the country, *Annual Report, Federal Aid in Fish and Wildlife Restoration,* Wildlife Management Institute and the Sports Fishing Institute, Washington, D. C. (1973).

Most Washingtonians love the outdoors and over the years the license fees and tags of millions of sportsmen have gone into the Game Fund. The Puyallup Tribe suggests that steelheaders account for 10% of the entire game fund (Pet. Br. 14). The Department of Game has many hunting and fishing programs. The steelhead sports fishermen almost completely finance the state's steelhead program (R. 143, 240; App. 29, 40). In 1972-73, the Department of Game expended a total of $1.6 million on its steelhead program (R. 143; App. 29), and received a total of $1.25 million from the steelhead fishermen from the sale of licenses and punch cards (R. 240; App. 40). Furthermore, the angler who fishes for

rainbow trout on Washington lakes may also fish for steelhead trout on Washington rivers (R. 595). There may be a different emphasis on the way the dollars are spent in a different year but the money still comes from the Game fund (R. 98).

Though no federal money has gone into the construction or operation of the South Tacoma hatchery (R. 140; App. 27-28), on a statewide basis there has been a small federal contribution to the Washington program only within the last decade (R. 146; App. 31). The Dingell-Johnson federal matching funds are also user money derived from a sales tax on fishing tackle and redistributed by the federal government (R. 448; App. 60-61) (84 Stat. 1101 (1970)). The general taxpayers do contribute to the Anadromous Fish Act funds which are matched by the states on a 50-50 basis (88 Stat. 398 (1974)). The federal contribution in Washington from this fund has been 1% to 2% of the budget of the Department of Game (Pl. Ex. 74-4); R. 160; R. 162).

Counsel for Ramona Bennett argued at trial that there is a "pervasive impact of federal funding" which should determine how this Court should rule.

Amendment X to the United States Constitution, a part of our Bill of Rights, provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by law to the States, are reserved to the States respectively, or to the people."

In cases such as *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405 (1973), this Court has made clear that even a substantial federal contribution of money, there social security payments, does not allow the federal government to take away the right of the state to run its own program. The states were reserved considerable police power over their territories since state governments can exercise control more advantageously than the national government. *Gibbons* v. *Ogden*, 9 Wheat 1, 6 L. Ed. 23, 72 (1824). Furthermore, courts should not find federal preemption over state regulation unless there is clear and manifest congressional intent because the states are powerless to remove the ill-effects of such a decision and Congress remains free to make clear its intentions. *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261 (1942). More recently this Court has held that federal district courts should not sit in review over decisions of state courts in criminal cases. *United States* v. *Janis*, — U.S. —, 96 S. Ct. 3021, — L. Ed. 2d — (1976).

The federal government has the right to place conditions on its grant of money to a state, and the state can then choose whether to accept or reject the gift after examining the strings that are attached. But suppose the strings only appear after the package is unwrapped and the contents used? No one told the state of Washington that if it accepted 1% to 2% of its Game Department budget from matching Anadromous Fish Act funds that this meant federal control.

Can a user group, such as sports fishermen, create a treasured recreational resource with their own money without having that treasure taken away by others? If the hatchery fish spent their entire life in wholly owned ponds, it is unquestioned that no one else could legally deplete the supply. *Arkansas Game and Fish Commission* v. *Storthz*, 181 Ark. 1089, 29 S.W. 2d 294 (1930); *Murphy* v. *Hitchcock*, 22 Hawaii 665 (1915); *Camp Clearwater, Inc.* v. *Plock*, 52 N.J. Super. 583, 146 A.2d 527 (1958), aff'd 157 A.2d 15 (1959), Annot. 57 A.L.R.2d 569, 587. There is no reason why the right to these artificially propagated hatchery plants cannot be maintained when they are released in a public river. An analogy might be found in grazing law. The ownership of cattle remains in its owner no matter which land is used by the cattle for grazing. *Arkansas Cattle Co.* v. *Mann*, 130 U.S. 69 (1889).

There are other areas of law where a landowner may not own what crosses his land. In Washington, the water in an artificial ditch is the personal property of the ditch builder and the landowners around the ditch have no riparian water rights and must give it safe passage through their land. *Methow Cattle Co.* v. *Williams*, 64 Wash. 457, 117 P. 239 (1911); *Madison* v. *McNeal*, 171 Wash. 669, 19 P.2d 97 (1933). If hatchery steelhead are not the property of the Treaty Indians they must be allowed to pass through the reservation uncaught.

The Supreme Court of Washington held that the

undisputed evidence in the trial record is that hatchery steelhead were unknown to the signers of the 1855 Treaty of Medicine Creek and were, therefore, not intended to be included within the Treaty. It must be remembered that the evidence in this case includes all the basic anthropological findings and records that were developed in the companion case of *U. S.* v. *Washington*. The *amicus curiae* Colville and other tribes seek to change the record on this case by arguing that hatcheries were established in Germany in 1863, France in 1852 and New York in 1864. (Am. Cur. Br., 30). Even if this were in the record, it has nothing to do with what was intended at Medicine Creek in the Pacific Northwest in 1855.

The Washington Supreme Court also says:

> "This result, which excludes hatchery bred fish from the Treaty right, is further supported by consideration of equity. The evidence below demonstrated that the steelhead program conducted by the State Department of Game is nearly totally funded by the citizens of the state, primarily via license and other user fees.[3] It would be manifestly unfair to give one group of citizens a superior opportunity to enjoy a resource thusly provided while denying other citizens, who provide the necessary funding, equal treatment. To allow the Indians to take hatchery fish by the use of nets would be to subsidize them to the extent that other state citizens are paying for the hatchery program, while being limited solely to the much less effective hook-and-line method of fishing. The Indian Treaty does not demand such a

subsidy. *See Puyallup II* at 49 (White, J. concurring)."

The Court adds in a footnote that:

"It is our opinion, furthermore, that even if the State Department of Game's programs were totally federally funded, the Indians absent specific conditions on such federal financing would enjoy only those rights available to all state citizens to the resources this provided." (Cert. Pet. App. B. 36, 37)

The Puyallup Tribe argued below that they are entitled to the hatchery fish because of the depletion of the natural run by the State of Washington. The Washington Supreme Court answers this argument by noting:

". . . Furthermore, the record does not demonstrate that the run has been depleted, but instead establishes that the artificially propagated run in fact augments the natural run since a hatchery bred steelhead loses its distinguishing characteristics upon returning to its native stream and henceforth is classified as a natural run steelhead." (Cert. Pet. App. B. 34, 35).

Furthermore, past steelhead runs on the Puyallup River have been damaged by the United States Government building dams and diking portions of the river (R. 728-729; App. 75, 77). The Puyallup Tribe's overfishing has threatened the runs. Indeed, the only group that has not damaged the runs are the sports fishermen, represented in this brief.

At trial, the Puyallup Tribe conceded that it had

no evidence of the size of the steelhead run in 1855 or have any way of allocating damage to past runs to any particular cause (R. 686, 688; App. 71, 72). The trial court allowed limited testimony (R. 726-731; App. 74-77), but basically excluded the opinions of the Tribe's expert witness as being too speculative (R. 689; App. 72-73).

The Puyallup Tribe argues that there are "intensely practical" reasons to let federal Judge Boldt retry the issue of the exclusion of hatchery fish (Pet. Br. 39). The "intensely practical" reasons are that they lost in this case and want a second chance.

Amicus curiae Colville Tribe et al are concerned that this case might set a precedent for Judge Boldt's later trial. We hope it will. Judge Boldt has already disregarded the *res judicata* effect of the decision of the Supreme Court of Washington in this case and proposes to allow the Puyallup Tribe to retry in 1978 the same issue against the same principal defendant. If this Court affirms, thereby excluding the hatchery fish from the Treaty fishery, we hope that Judge Boldt will give some weight to the decision.

This Court asked for a record to be developed on hatchery steelhead in its remand in this case. A full record is now available for review. The concurring opinion in *Puyallup II* can and should now be accepted by the majority.

V. The Supreme Court of Washington Should Be Affirmed in Deciding That the Treaty Language "In Common with All Citizens of the Territory" Reserves to the Puyallup Tribe An Equitable Share of the Natural Run of Steelhead on the Puyallup River

The Washington Supreme Court starts out by construing the words in the Treaty of Medicine Creek "in common with all citizens of the territory" which are the measure of the Tribal right. Judge Boldt in *U. S.* v. *Washington*, 384 F. Supp. 312, said that these words meant 50-50. He then developed a seven element definition of what he called the principle of "sharing equally." 384 F. Supp. 312, 343. The concurring opinion of the Washington Supreme Court in our case has pointed out that under the Judge Boldt formula, the following occurred in December, 1975:

> ". . . the Indians caught 2,476 fish on the Puyallup River, while 1,341 sportsmen fishing by line and hook caught only 102. In Western Washington Green River, 12,000 non-Indians caught only 50 fish, while Indian netters took 3,839. On the Skagit River, 893 sportsmen caught 89 fish while the Indians netted 2,367 fish." 548 P.2d 1058 at 1079 (Cert. Pet. App. B. 664).[3]

The Washington Supreme Court differed from Judge Boldt's interpretation of the treaty language "in common." It basically held that the words "in

[3] This is because the hook and line sportsmen steelhead fishery is upstream and behind the Indian gill nets at the mouths of the rivers. The figures would be different for salmon where the non-Indian fishery, primarily commercial, is in the ocean ahead of the Indian nets.

common" meant an equal opportunity with other citizens, and that the Puyallup Tribe is not entitled to any specific number of fish. The Washington Supreme Court asks this Court to rethink its mandate in *Puyallup II* that there be a specific allocation. But if *Puyallup II* is to remain good law, it then turns to the allocation.

This Court in *Puyallup II* discussed some of the factors to be considered by the Washington Courts in making the allocation of Puyallup River steelhead:

> "Only an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species. If hook and line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned. What formula should be employed is not for us to propose. There are many variables—the number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook and line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing and the like." *Puyallup II*, 414 U.S. 44, 48, 49.

Judge Brown at trial considered the factors and then determined that 45% of the natural steelhead

run was a fair allocation for the small number of Puyallup Tribal fishermen. The Washington Supreme Court affirmed his decision and this Court should agree.

The Puyallup Tribe, on the other hand, argues that it is entitled to an allocation of all of the steelhead because they swim through the "reservation." Such an allocation does not comply with the instruction of this Court in *Puyallup II* "to accommodate the rights of Indians under the Treaty and the rights of other people." 414 U.S. 44, 49.

CONCLUSION

This case not only deals with justice for the Puyallup Tribe and the sports fishermen; it also requires a definition of responsibility within the federal system. The basic thrust of petitioners' argument here and in the related federal court litigation is that the state of Washington cannot be trusted to protect Indian Treaty rights. The suggested solution is to turn over management of the anadromous fishery to the federal government.

Northwest Steelheaders Council of Trout Unlimited and Gary Ellis want the Puyallup Tribe to have every right guaranteed in the Treaty of Medicine Creek. The Puyallup fishermen are entitled to a fair opportunity of catching natural run steelhead with gill nets on the Puyallup River since the small steelhead catch is part of their tribal way of earning their livelihood.

But, we the sports fishermen, are the "other people" that this Court in *Puyallup II* said had "rights." Our rights include the hatchery steelhead that we have paid for with our earmarked license fees and tags which augment the natural run. Since 5,171 of us fish the Puyallup River compared to 20 Puyallup Tribe families, we, too, are entitled to a fair opportunity to catch natural run steelhead.

The Puyallup Tribe and the sports fishermen have an identical interest in seeking to have state and federal government replenish damaged runs. That com-

mon ground can be found is shown by the pending Tribal approved settlement of the Columbia River controversy, which entirely removes steelhead as a "target fish" from the Treaty Indian fishery. (Citation to the Oregon Federal Court case not available).

The Puyallups and other Treaty Indian tribes have been reluctant to accept state management of the resource because of past state unfairness. But the solution is neither to establish a federal judge as perpetual fishmaster, as is now occurring for other western Washington rivers, nor to have management decisions made by user groups.

The solution which will most benefit present and future fishermen is unified, expert, independent state management of the resource that protects the rights of all.

The decision of the Supreme Court of Washington should be affirmed so that good conservation can be good law.

Respectfully submitted,

DON S. WILLNER
WILLNER, BENNETT, RIGGS & SKARSTAD
One S. W. Columbia, Suite 1400
Portland, Oregon 97258
Counsel for Respondents
Northwest Steelheaders Council of
Trout Unlimited and Gary Ellis

ATTACHMENT A

AFFIDAVIT
OF DON S. WILLNER IN SUPPORT OF
MOTION FOR EXTENSION OF TIME

STATE OF OREGON)
) ss
COUNTY OF MULTNOMAH)

I, DON S. WILLNER, being first duly sworn, depose and say:

I am the attorney for Northwest Steelheaders Council of Trout Unlimited and Gary Ellis, respondents and counter-petitioners herein. The decision of the Washington Supreme Court basically held that:

(1) The state of Washington had the right to regulate the entire steelhead fishery on the Puyallup River in the interest of conservation.

(2) The artificially propagated hatchery steelhead should be excluded from the treaty fishery of the Puyallup Tribe.

(3) The allocation of natural run steelhead made by the trial court between the Puyallup Tribe, commercial gill net fishermen and the sports fishermen was affirmed.

This case was decided by the superior and supreme courts of Washington upon remand from this Court. The decision is directly contrary to the decision of the Ninth Circuit in *United States* v. *Washington*, 520 F.2d 677 (9th Cir. 1975), cert. den. 96 S. Ct. 877.

This conflict which is the basis for the petition and counter-petitions for certiorari, raises a fundamental issue of the relationship of state and federal government, and is the single controversy of most widespread public concern in the state of Washington.

After the decision of the Washington Supreme Court the Puyallup Tribe and others went to the United States District Court for the Western District of Washington and in a case in which my clients were denied the right to intervene obtained an injunction against the Washington Department of Game excluding the hatchery steelhead from the treaty fishery.

On several occasions between June 25, 1976 and September 22, 1976 I talked to John Clinebell and William Rodgers, attorneys for the Puyallup Tribe, and either or both assured me that they would petition for certiorari in this case, and their petition would raise both the right of the state to regulate the steelhead fishery on the entire river and the exclusion of the hatchery steelhead from the treaty fishery. Relying on this assurance I did not file a petition for certiorari by September 23, 1976. It was only thereafter when I received their petition for certiorari that I learned for the first time that the Puyallup Tribe was seeking to have this Court review only a portion of the decision of the Supreme Court of Washington.

I had planned to respond to the petition by urging this Court to grant certiorari. With the Puyallup Tribe having sought certiorari on only one issue, con-

trary to the previous assurance to me, it became necessary for me to file a response and counter-petition. This document in proper form, Exhibit A, was tendered to the Clerk of the Supreme Court on October 22, 1976 and was not accepted for filing. (The Clerk did grant a two-week extension for reprinting the document and calling it a Response.)

The document should be filed in its present form as both a Response and Counter-Petition because of the importance of the issues raised by the counter-petition and the circumstances set forth in this affidavit.

The requirements of Rule 22 (4) are included in Exhibit A attached hereto. The judgment sought to be reviewed is attached as Exhibit B.

/s/ *Don S. Willner*

DON S. WILLNER

SUBSCRIBED AND SWORN to before me this 26 day of October, 1976.

/s/ *Audrey Ansell*

Notary Public for Oregon

My commission expires: 1/26/78

ATTACHMENT B

IN THE SUPREME COURT
of the
STATE OF WASHINGTON

PUGET SOUND GILLNETTERS ASSOCIATION) a non-profit Washington corporation;) PHILIP SUTHERLAND,)
Petitioners,)
v.) No. 44401
)
DONALD MOOS, Director, Washington) State Department of Fisheries; STATE) OF WASHINGTON, DEPARTMENT OF) FISHERIES,)
Respondent.)

STATE OF WASHINGTON,)
) ss.
COUNTY OF THURSTON.)

I, JOHN J. CHAMPAGNE, Clerk of the Supreme Court of the State of Washington, do hereby certify that the attached and foregoing is a full, true and correct transcription of a portion of the argument presented by Edmund Clark, United States Department of Justice, on November 9, 1976 in the above entitled cause and now appears of record and on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 16th day of February, 1977.
(SEAL)

by REGINALD W. SHIVER, Deputy
JOHN J. CHAMPAGNE,
Clerk of the Supreme Court
State of Washington

Q. Council, I hate to still pursue the question of using your good offices to get the Supreme Court to take jurisdiction because you see in past events we've had some violence and some . . .

A. Off the record I strongly suspect that I will recommend that the Supreme Court take the case. I have not so done yet.

ATTACHMENT C

DON BONKER
Third Congressional District
State of Washington

CONGRESS OF THE UNITED STATES
House of Representatives
Washington, D. C. 20515
February 11, 1977

Honorable Griffin Bell
United States Attorney General
Washington, D. C.

Dear Mr. Attorney General:

The Indian fishing rights controversy in the State of Washington remains in something of a legal fog. Opportunity is now at hand for the United States Supreme Court to finally resolve the legal uncertainty. While we take no position on the merits of the issues, their authoritative resolution by the Supreme Court would benefit all parties.

In several different cases, Federal District Courts and the Ninth Circuit Court of Appeals have rendered opinions at variance with opinions of the Supreme Court of Washington on these basic issues:

1. Limitations on the right of the state of Washington to manage the resource in the interest of conservation.

2. The exclusion of hatchery-propagated fish from the treaty fishery.

3. The interpretation of the treaty language "in common," which results in the allocation of fish to various user groups.

The United States Supreme Court recently granted certiorari in the case of *Department of Game* v. *Puyallup Tribe, Inc.* We feel this case is a vehicle for resolution by the United States Supreme Court of these basic issues. Without stating any opinion on the merits, and certainly without urging any posture upon the Department of Justice, we do urgently request the Department seek in its *amicus* brief to present the issues to the court.

Sincerely,

Warren G. Magnuson, U.S.S.
Don Bonker, M.C.
Norman D. Dicks, M.C.

Henry M. Jackson, U.S.S.
Lloyd Meeds, M.C.
Joel Pritchard, M.C.

ATTACHMENT D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al, Plaintiffs,	)	Civil No. 9213
vs.	)	
STATE OF WASHINGTON, et al, Defendants.	)	ORDER GRANTING PRELIMINARY INJUNCTION

Dr. Whitney, Technical Advisor to the Court, advises that it is highly desirable for all concerned that the Court's decision on the Motion for a Preliminary Injunction be determined prior to August 15, 1976.

The Court has fully considered all of the issues, contentions and Proposed Findings of Fact and Conclusions of Law submitted by the parties pertaining to the so-called "hatchery issues."

Typing of the Findings of Fact, Conclusions of Law and rulings of the Court on all issues is in progress and will be completed, filed for entry with the Clerk and distributed to counsel for all parties, Monday, 8/16/76.

For the reason above stated, the Court hereby holds, finds and orders that the Temporary Restraining Order, entered 7/14/76 and by agreement of all parties continued in effect until further order of the court, be hereby replaced by a Preliminary Injunction providing as follows:

Federal Court Injunction (8/13/76)

The Defendant State of Washington, including its Directors of Fisheries and Game, and all other officers, employees, agents and attorneys of each are restrained and enjoined from basing the determination of numbers of harvestable fish which Treaty Indians shall have the opportunity to take pursuant to this Court's previous decisions, on anything other than the total estimated runs of free-swimming fish, including those resulting from hatchery or other artificial propagation or transplanting programs. This order applies to the entire case area, each of the tribes, and all of the waters within the case area.

This injunction shall continue in effect until further order of the Court after entry of final determination in Phase II.

IT IS SO ORDERED this 13th day of August, 1976.

/s/ *George H. Boldt*
GEORGE H. BOLDT
Sr. United States
District Judge